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Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-45

GEORGE HANTSCHO CO., INC.,
Petitioner,

versus

BRIAN ATWOOD WANSOR, ET AL
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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OPINIONS BELOW

The initial opinion of the Fifth Circuit Court of Appeals is reported in 570 F.2d 1202 and is reprinted in Appendix A to this Petition. The Petition of George Hantscho Co., Inc. for Rehearing and Rehearing En Banc was denied May 24, 1978, but the initial opinion of the Fifth Circuit Court of Appeals was amended on the same date. This amendment to the original opinion is not yet reported, but is reprinted in Appendix B to this Petition.

JURISDICTION

The original decision of the Fifth Circuit Court of Appeals was entered on March 24, 1978. (Appendix A,

infra, p. 1a.) Petitioner, George Hantscho Co., Inc., filed its timely petition for rehearing and rehearing en banc on April 5, 1978. On May 24, 1978, the Fifth Circuit Court of Appeals amended its initial opinion but denied the aforesaid petitions for rehearing and rehearing en banc. (Appendix B, infra, p. 1b.) Jurisdiction of this Honorable Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1.

Does an experienced attorney's "misunderstanding" of the Federal Rules of Appellate Procedure constitute "excusable neglect" within the meaning of F.R.A.P. 4(a); thereby allowing an appellate court to entertain jurisdiction over an appeal which would otherwise be barred by the filing of a Notice of Appeal 50 days from date of the appealable judgment?

2.

Does an experienced attorney's "misunderstanding" of the Federal Rules of Civil or Appellate Procedure constitute "excusable neglect" within the meaning of such Federal Rules; thereby authorizing the belated filing of Notices of Appeal, compulsory counterclaims, and noncompliance with other Federal Rules which contain time requirements on the ground that counsel "misunderstood" the rules?

3.

If an experienced attorney's "misunderstanding of the law" is "excusable neglect" will this permit the setting aside of judgments under F.R.C.P. 60(b) because trial counsel did not "understand" the rules under which such case was tried?

4.

Does Rule 4(a), Federal Rules of Appellate Procedure, allow a District Court 50 days after date of the appealable judgment to enter an order extending the time for filing a Notice of Appeal without appellant having first filed any written motion seeking such extension?

STATUTES INVOLVED

The following provision of the Federal Rules of Appellate Procedure is relevant to the questions presented by this petition.

F.R.A.P. 4(a):

"APPEAL AS OF RIGHT — WHEN TAKEN

"(a) **Appeals in Civil Cases.** In a civil case (including a civil action which involves an admiralty or maritime claim and a proceeding in bankruptcy or a controversy arising therein) in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days of the date of the entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days of such entry. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this subdivision, whichever period last expires.

"The running of the time for filing a notice of appeal is terminated as to all parties by a timely motion filed in the district court by any party pursuant to the Federal Rules of Civil Procedure hereafter enumerated in this sentence, and the full time

for appeal fixed by this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: (1) granting or denying a motion for judgment under Rule 50(b); (2) granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) granting or denying a motion under Rule 59 to alter or amend the judgment; (4) denying a motion for a new trial under Rule 59. A judgment or order is entered within the meaning of this subdivision when it is entered in the civil docket.

"Upon a showing of excusable neglect, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision. Such an extension may be granted before or after the time otherwise prescribed by this subdivision has expired; but if a request for an extension is made after such time has expired, it shall be made by motion with such notice as the court shall deem appropriate."

The following portions of the Federal Rules of Civil Procedure are relevant to the questions presented by this petition.

F.R.C.P. 6:

"TIME

* * * * *

"(b) **Enlargement.** When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b), 52(b), 59(b), (d) and (e), and 60(b), except to the extent and under the conditions stated in them."

* * * * *

"(d) **For Motions — Affidavits.** A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59(c), opposing affidavits may be served not later than 1 day before the hearing, unless the court permits them to be served at some other time."

F.R.C.P. 7:

"PLEADINGS ALLOWED; FORM OF MOTIONS

* * * * *

"(b) **Motions and Other Papers.**

"(1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

"(2) The rules applicable to captions, signing, and

other matters of form of pleadings apply to all motions and other papers provided for by these rules."

F.R.C.P. 13:

"COUNTERCLAIM AND CROSS-CLAIM

* * * * *

"(f) **Omitted Counterclaim.** When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment."

F.R.C.P. 60:

"RELIEF FROM JUDGMENT OR ORDER

* * * * *

"(b) **Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.** On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., §1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action."

STATEMENT OF THE CASE

The Fifth Circuit Court of Appeals has held that an experienced attorney's "misunderstanding" of the Federal Rules of Appellate Procedure constitutes "excusable neglect" within the meaning of F.R.A.P. 4(a); thereby accepting jurisdiction over this appeal which is otherwise barred by the filing of a Notice of Appeal 50 days from the date of appealable judgment. Such decision is contrary to decisions of the First, Second, Seventh, Eighth, Ninth and Tenth Circuits.

This case involves an action for damages arising out of personal injuries sustained on August 10, 1971. Jurisdiction in the Federal Court was based upon diversity of citizenship between Appellant-Plaintiff and Appellee-Defendant, George Hantscho Co., Inc., an out-of-state manufacturer of a printing press.

The procedural history of this case may be summarized as follows:

On March 20, 1975, at the close of plaintiff's evidence, the District Court directed a verdict for the defendant. (R. 868-69).

On March 28, 1975, the plaintiff filed a motion for new

trial, a motion for judgment notwithstanding the verdict, a motion to set aside the judgment, and a motion for transcript forma pauperis. (R. 870-963).

On May 16, 1975, the plaintiff filed amended motions for new trial, for judgment notwithstanding the verdict, and to set aside the judgment. (R. 981-998).

On June 4, 1975, the District Court entered an Order denying plaintiff's motion for new trial, motion for judgment notwithstanding the verdict, motion to set aside the judgment (which was treated as a motion for judgment notwithstanding the verdict under F.R.C.P. 50), and the motion for transcript forma pauperis. (R. 999).

On June 13, 1975, plaintiff filed a motion for reconsideration, seeking reconsideration of the District Court's Order of June 4, 1975, which Order had denied plaintiff's prior motions, including a motion for new trial. (R. 1004).

On July 22, 1975, the District Court denied plaintiff's motion to reconsider. (R. 1017).

On July 24, 1975, 50 days after the District Court's denial of plaintiff's motion for new trial, plaintiff, without first filing or serving any written motion seeking an extension of time to file a Notice of Appeal, obtained an order from the District Court extending the time for plaintiff to file a Notice of Appeal. The District Court's order granting such extension was based upon counsel for plaintiff's misunderstanding of the Federal Rules of Appellate Procedure. (R. 1019) (Appendix A, infra, p. 9a-10a).

On July 24, 1975, plaintiff filed a Notice of Appeal. (R. 1018).

On March 24, 1978, the Fifth Circuit Court of Appeals

rendered their original opinion finding that jurisdiction did exist over this belated appeal because the District Court judge had found that the cause of the delay, counsel's misunderstanding of F.R.A.P. 4(a), constituted excusable neglect. (Appendix A, infra, p. 9a-10a).

On May 24, 1978, following defendant's timely petition for a rehearing and rehearing en banc, the Fifth Circuit Court of Appeals denied said petitions but amended its original opinion to state that they did not "hold that a bona fide misunderstanding or mistake as to the law by counsel will constitute excusable neglect" but rather that under the circumstances, the District Court judge did not abuse his discretion in extending the time for appeal. (Appendix B, infra, p. 1b). Nevertheless, and in spite of what the Fifth Circuit may have stated in its rewritten opinion, it has in fact and in law held that such a "misunderstanding or mistake as to the law" constitutes "excusable neglect"; otherwise, it would have had to dismiss the appeal.

Petitioner seeks a writ of certiorari from this Honorable Court to review the decision of the Fifth Circuit Court of Appeals as amended, insofar as it holds that it has jurisdiction over the appeal in this case.

REASONS FOR GRANTING THE WRIT

I.

The Decision Below Erroneously Holds That A "Misunderstanding Of The Law" Constitutes "Excusable Neglect" Within The Meaning Of Rule 4(a), Federal Rules Of Appellate Procedure; Thereby Permitting The Filing Of A Notice Of Appeal Fifty (50) Days From The Date Of The Appealable Judgment, Which Holding Conflicts With

The Decisions Of Six Other Circuits Defining And Applying "Excusable Neglect".

The decision of the Fifth Circuit in this case is directly in conflict with decisions of the First, Second, Seventh, Eighth, Ninth and Tenth Circuits, as well as being contrary in principle to prior decisions of the Fifth Circuit and the United States Supreme Court.

The Fifth Circuit Court of Appeals in the instant case has held that an attorney's "misunderstanding" of the Federal Rules of Appellate Procedure constitutes "excusable neglect" within the meaning of F.R.A.P. 4(a). This is a significant and unprecedented expansion of the standard of "excusable neglect". This holding is clearly contrary to decisions of other Circuit Courts of the United States which have considered this question, and is contrary in principle to the standard of "unique circumstances" expressed by the United States Supreme Court in *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962).

The decision of the Fifth Circuit in this case is in effect an amendement to F.R.A.P. 4(a); providing, in effect, an automatic 60 day period of time within which to file a Notice of Appeal. Such a result casts substantial doubt on the finality of judgments. Cf. *Files v. City of Rockford*, 440 F.2d 811, 816 (7th Cir. 1971).

Every other Circuit Court of Appeals which has considered the standard for excusable neglect has followed the guidelines of the Advisory Committee which drafted Rule 4(a). See, e.g., *Maryland Casualty Co. v. Conner*, 382 F.2d 13, 16 (10th Cir. 1967). These other Circuit Courts have developed the general rule that an attorney's failure to file a timely appeal because of neglect, oversight,

or misunderstanding of the rules is not sufficient to meet the requirements of "excusable neglect". *Fase v. Seafarers Welfare and Pension Plan*, 574 F.2d 72 (2nd Cir. 1978) (Reversing District Court's finding of "excusable neglect" and dismissing the appeal); *Airline Pilots in the Service of Executive Airlines, Inc. v. Executive Airlines, Inc.*, 569 F.2d 1174 (1st Cir. 1978) (Order of District Court extending time for appeal reversed and appeal dismissed); *Spound v. Mohasco Industries, Inc.*, 534 F.2d 404, 410-411 (1st Cir. 1976); *Gooch v. Skelly Oil Co.*, 493 F.2d 366 (10th Cir. 1974); *Harlan v. Graybar Electric Co.*, 442 F.2d 425 (9th Cir. 1971); *Files v. City of Rockford*, 440 F.2d 811 (7th Cir. 1971); *Buckley v. United States*, 382 F.2d 611 (10th Cir. 1967), *cert. denied*, 390 U.S. 997 (1968); *Winchell v. Lortscher*, 377 F.2d 247 (8th Cir. 1967); *Maryland Casualty Co. v. Conner*, 382 F.2d 13 (10th Cir. 1967); *Reed v. Kroger Co.*, 478 F.2d 1268 (Emer. Ct. App. 1973).

As stated in *Spound v. Mohasco Industries, Inc.*, supra.:

> ". . . After 30 days from judgment a party can appeal only in accordance with the final paragraph of F.R.A.P. 4(a) viz, upon a showing of 'excusable neglect', the establishment of which is jurisdictional . . . Excusable neglect calls for 'circumstances that are unique or extraordinary' . . . If this includes a mere palpable mistake by experienced counsel, the requirement would be meaningless. . ." . *Spound v. Mohasco Industries, Inc.*, 534 F.2d 404, 410, 411 (1st Cir. 1976).

The First Circuit reaffirmed this position earlier this year, reversing a finding of excusable neglect by the District Court and dismissing the appeal, stating:

> "Cases from this and other circuits make it clear that a mistake such as this is not excusable neglect

within the meaning of the rule. . . .

> A mistake made by an attorney or his staff is not, except in unusual or extraordinary circumstances not present here, such excusable neglect as to invoke the Rule." *Airline Pilots in the Service of Executive Airlines, Inc. v. Executive Airlines, Inc.*, supra at 1175.

In an opinion rendered February 22, 1978, the Second Circuit, in keeping with the First Circuit, also reversed the District Court's finding of "Excusable Neglect" noting:

> "Here, 'the failure to act was the result either of a failure to understand the law, or of one of those careless omissions to which everyone is indeed subject, but which do not excuse inaction.' . . . " *Fase v. Seafarers Welfare and Pension Plan*, supra at 77.

The *Harlan* and *Buckley* cases cited above both dealt with attorneys who had misread or misunderstood rules. *Buckley* involved failure by counsel for a criminal defendant to file a timely notice of appeal. The appeal was filed two days after the expiration of the ten-day period allowed under former Rule 37 of the Federal Rules of Criminal Procedure. Appellant urged that his failure to file on time was the result of excusable neglect, because he was unfamiliar with the *local practice* regarding docketing of the denial of a motion and was unsure when the ten-day period began to run. The District Court denied the appellant's motion to extend time based upon excusable neglect. On appeal, the Tenth Circuit noted that the grounds alleged by counsel as excusable neglect were not sufficient, and that the multiplication of inadequate reasons only served to emphasize their inadequacy. The Court then held that the ruling of the trial judge was clearly correct; misunderstanding of the local rules of

practice was not excusable neglect. *Buckley v. United States*, 382 F.2d 611 (10th Cir. 1967), *cert. denied*, 390 U.S. 997 (1968).

In order for a Court of Appeals to acquire jurisdiction an appeal must be filed on time. *Ellis v. Richardson*, 471 F.2d 721 (5th Cir. 1973); *Tribbitt v. Wainwright*, 462 F.2d 600 (5th Cir. 1972); *Gulf-Tampa Dry Dock Co. v. Vessel Virginia Trader*, 435 F.2d 150 (5th Cir. 1970). Since the plaintiff's appeal in the case at bar was not filed on time, the Court of Appeals had no jurisdiction of this appeal unless it held that the District Court correctly ruled that counsel for Plaintiff's misunderstanding of the law was excusable neglect. In its amended opinion (Appendix B, infra), the Court below recites that it is not holding that a misunderstanding or mistake as to the law will constitute excusable neglect; however, by retaining jurisdiction over this appeal, under the facts of this case, the Fifth Circuit is in fact and in law so holding in spite of the "lip service" paid the general and correct rule. (Compare Appendix B, infra. p. 1b, with Appendix A, infra, p. 9a-10a). If, as in *Buckley*, failure to understand the *local rules* of a District Court is not excusable neglect, then *a fortiori*, counsel's misunderstanding of the Federal Rules of Appellate Procedure cannot be excusable neglect in this case.

Harlan v. Graybar Electric Co., 442 F.2d 425 (9th Cir. 1971), lends further support to this conclusion. There the Court stated:

> ". . . And although the fact that the appellant's counsel 'misread' the rule to allow 60 not 30 days in which to file the notice does show neglect, it certainly does not make the neglect 'excusable'." *Harlan v. Graybar Electric Co.*, supra, at 426.

In summary, it is respectfully submitted that the de-

parture of the Fifth Circuit from the unanimous position of five other Circuit Courts of Appeals has created a conflict between the Circuits on the interpretation of an important term affecting not only the Federal Rules of Appellate Procedure, but also the Federal Rules of Civil Procedure. In addition, the present decision of the Fifth Circuit threatens to undermine the finality of judgments and substantially weakens the framework of the Federal Rules of Civil Procedure. See F.R.C.P. 60(b); *Files v. City of Rockford*, 440 F.2d 811, 816 (7th Cir. 1971).

II.

The Decision Below Ignores The United States Supreme Court's Standard Of "Unique Circumstances" For Excusing Non-Compliance With The Federal Rules Of Appellate Procedure, Thereby Casting Substantial Doubt On The Finality Of Judgments In The Fifth Circuit.

Under the facts of this case the Court below has held that an attorney's "misunderstanding" of the Federal Rules of Appellate Procedure constitutes "excusable neglect" within the meaning of F.R.A.P. 4(a) (Appendix A, infra, p. 9a-10a). This is a significant departure from all prior Circuit Court definitions of excusable neglect, and ignores the standard of "unique circumstances" expressed by the United States Supreme Court in *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962).

In the *Harris Truck Lines* case, this Honorable Court reversed the dismissal of an appeal by the Seventh Circuit. This Court found that the record contained a showing of "unique circumstances" sufficient that the Court of Appeals should not have disturbed the district court judge's finding of excusable neglect. The unique circumstances in *Harris Truck Lines* were that the appellant had

asked for an extension of time within which to file his appeal within the initial thirty-day period. The district court judge had granted a two-week extension, and the appellant had filed his Notice of Appeal within the time as extended. The Court of Appeals dismissed the appeal, holding that a showing of excusable neglect had not been made out to the trial judge, and therefore there was no basis for waiving the thirty-day time limit. This Honorable Court reversed the Seventh Circuit, finding that the appellant's initial motion to extend the time for filing a notice of appeal had come within the initial allowable thirty-day period. Appellant could have filed a timely Notice of Appeal, but relied on the district court's extension of time as being effective; therefore, Appellant delayed filing its notice of appeal an additional two weeks. Counsel for the appellant's reliance upon the district court's order was the basis of the "unique circumstances" which authorized the late appeal. Compare *Harris Truck Lines, supra*, with *LeVisa Stone Corp. v. Elkhorn Stone Co.*, 411 F.2d 1208 (6th Cir. 1969), *cert denied*, 397 U.S. 925 (1970). In the case at bar the record shows no unique circumstances such as described in the *Harris Truck Lines* case. Rather the case at bar shows only counsel's misunderstanding of the Federal Rules of Appellate Procedure, an excuse which all other Circuit Courts of Appeal have found insufficient as a matter of law. E.g., *Buckley v. United States*, 382 F.2d 611 (10th Cir. 1967), *cert. denied*, 390 U.S. 997 (1968) (An attorney's unfamiliarity with *local rules* did not constitute excusable neglect).

Prior to the 1966 Amendments to the Federal Rules of Civil Procedure, it was provided by F.R.C.P. 73 (a) [the predecessor to F.R.A.P. 4(a)] that the District Court could extend the time for appeal "upon a showing of ex-

cusable neglect based upon the failure of a party to learn of entry of the judgment." The 1966 Amendment dropped the specific requirement of the failure to learn of the entry of a judgment, but such Amendment was not intended to allow the finding of excusable neglect every time a lawyer missed an appeal deadline. This is shown by the Advisory Committee Note on the Amendment which is as follows:

> "The original rule authorized the district court to extend the time for appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed 'upon a showing of excusable neglect based upon a failure of a party to learn of the entry of the judgment * * * '. The exception numbered (2) eliminates the phrase 'based upon a failure of a party to learn of the entry of the judgment' and thus empowers the district court to extend the time upon the showing of excusable neglect of any kind. In view of the ease with which an appeal may be perfected, *no reason other than failure to learn of the entry of judgment should ordinarily excuse a party from the requirement that the notice be timely filed.* But the district court should have authority to permit the notice to be filed out of time in *extraordinary* cases where injustice would otherwise result." (emphasis added). Quoted in *Maryland Casualty Co. v. Conner*, 382 F.2d. 13, 16 (10th Cir. 1967).

The clear intent of the Advisory Committee was to maintain the standard of "unique circumstances" established by this Honorable Court in the *Harris Truck Lines* case. Other Circuit Courts which have considered this question have followed the suggestions of the Advisory Committee and required unique circumstances for a showing of excusable neglect. E.g., *Fase v. Seafarers Welfare and Pension Plan*, 574 F.2d 72, 76-77 (2nd Cir. 1978); *LeVisa Stone Corp. v. Elkhorn Stone Co.*, 411 F.2d 1208 (6th Cir. 1969), *cert. denied*, 397 U.S. 925 (1970).

This Court has expressed a similar standard in cases where an appellant to the United States Supreme Court has failed to comply with this Court's Rule 13(1) requiring docketing of an appeal within ninety days. In *Pittsburgh Towing Co. v. Mississippi Valley Barge Line Co.*, 385 U.S. 32 (1966), this Court dismissed a belated appeal where the excuse given by the appellant for the delay was that there had been a "misunderstanding" between Counsel for appellant. In refusing to accept appellant's excuse for the belated appeal, this Court noted that:

> "[F]airness to other counsel and to parties with business before the Court as well as due regard for our own procedures leads us to believe that this case does not warrant our indulgence." *Pittsburgh Towing Co. v. Mississippi Valley Barge Co.*, supra at 33.

It is respectfully submitted that fairness to other counsel and due regard for the Federal Rules of Appellate Procedure require dismissal of the appeal in the case at bar. This is especially true where, as in the instant case, the requirement of a timely appeal is jurisdictional. *Tribbitt v. Wainwright*, 462 F.2d 600 (5th Cir. 1972).

The unanimity of the other Circuit Courts of Appeal on this issue was noted by the Temporary Emergency Court of Appeals in *Reed v. Kroger Co.*, 478 F.2d 1268 (Emer. Ct. App. 1973), where the appellant failed to file his timely appeal because of a misunderstanding of the Rules of the Temporary Emergency Court of Appeals. This Court stated:

> "Initially we note that we are concerned not with an insignificant procedural rule, but rather with one '[t]he courts have uniformly held . . . [to be] mandatory and jurisdictional.' [Citations omitted] . . .
>
> Finally, we must measure the action of counsel for

> appellant in recognition of 'the ease with which an appeal may be perfected.' *Files v. Rockford*, supra, 440 F. 2d at 814." *Reed v. Kroger Co.*, supra at 1270-71.

The Court then compared the unique and severe circumstances involved in *Harris Truck Lines*, supra, and *Fallen v. United States*, 378 U.S. 139 (1964), with counsel's failure to comply with that Court's requirements for filing an appeal and held:

> "We are unable to conclude that counsel's failure to acquaint himself with the basic requirements for the filing of his client's notice of appeal can properly be described as constituting 'unique circumstances' or 'all that could reasonably be expected.' Indeed, unfamiliarity with local practice does not even constitute 'excusable neglect,' let alone satisfy the higher standard recognized by the Supreme Court. See *Files v. Rockford*, supra, 440 F.2d at 814, quoting 9 J. Moore, Federal Practice ¶ 203.25[3] (2d ed. 1971). The case is dismissed." *Reed v. Kroger Co.*, supra at 1272.

The decision of the Fifth Circuit Court of Appeals in this case, in addition to being contrary to the standard expressed in *Harris Truck Lines*, is also contrary in principle to prior decisions of the Fifth Circuit on another common but non-meritorious excuse, preoccupation with other matters. *United States v. Bowen*, 310 F.2d 45 (5th Cir. 1962); Cf. *Diffenderfer v. Homer*, 408 F.2d 1344 (5th Cir. 1969) (dicta).

In their amendment to the opinion in the instant case (Appendix B, infra, p. 1b), the Court of Appeals added additional language to their opinion as follows:

> "We do not hold that a bona fide misunderstanding or mistake as to the law by counsel will constitute excusable neglect. We recognize that such a proposition would make the requirement of timely filing almost undeterminable [Citations omitted]. . . . All we decide here is that, viewing the facts and circumstances as a whole, the District Court Judge did not abuse his discretion in granting an extended time for appeal." (Appendix B, infra, p. 1b-2b).

While stating *eo nomine* that they do not hold a bona fide misunderstanding or mistake to constitute excusable neglect, by affirming the order of the district court extending the time for the filing of a belated notice of appeal in this case, this is exactly what the Fifth Circuit has held.

A review of the record in this case will show that the *very* and *only* basis for the District Court's Order was just such a "misunderstanding or mistake as to the law". (R. 1019). (Appendix A, infra, p. 9a-10a). The Fifth Circuit has stated in their amended opinion that they do not hold that such a misunderstanding will constitute excusable neglect, while doing precisely that in order to retain jurisdiction of the instant appeal. It is respectfully submitted that the failure of the Fifth Circuit to follow the Federal Rules, the unanimous opinion of its sister circuits, and the standard set forth in the *Harris Truck Lines* case in practice, while at the same time purporting to approve a stricter standard in its opinion, is a significant departure from the usual course of judicial proceedings and authorizes this Court to correct this error by the exercise of its power of supervision.

In summary, it is respectfully submitted that to condone an attorney's failure to comply with Federal Rules because of "misunderstanding" by finding "excusable neglect" based upon such misunderstanding will result in chaos. As stated in *Surg-O-Flex of America Inc. v. Bergen Brunswig Co.*, 76 F.R.D. 654, 655 (1977):

". . . Inexperience and unfamiliarity with the Federal Rules was the only explanation offered by plaintiff's attorney. Suffice it to say that this justification is unacceptable. Such an explanation strains one's credulity; particularly when given by an attorney. . . ." *Surg-O-Flex of America, Inc. v. Bergen Brunswig Co.*, supra at 655.

III.

The Decision Below, Which Erroneously Equates A Misunderstanding Of The Law With "Excusable Neglect" Under The Federal Rules, Will Affect The Application Of Both The Federal Rules Of Civil And Appellate Procedure, Wherever The Term "Excusable Neglect" Is Used.

The Fifth Circuit's interpretation and application of the term "excusable neglect" cannot be limited to this case, nor even to appeals in general. The term "excusable neglect" appears in Rules 6(b), 13(f) and 60(b) of the Federal Rules of Civil Procedure. If the term "excusable neglect" is synonymous with an attorney's misunderstanding of the Federal Rules for the purpose of the case sub judice, then it must likewise be synonymous in other cases and other applications. If not reversed and corrected, this holding must also apply to an attorney's misunderstanding of the requirements for filing a compulsory counterclaim (F.R.C.P. 13(f)), or an attorney's misunderstanding of the rules of law which lead to an order or judgment against his client (F.R.C.P. 60(b)), or to such attorney's misunderstanding of the time requirements of all discovery rules as well as nearly every other Federal Rule which contains a time requirement (F.R.C.P. 6(b)).

The Fifth Circuit by retaining jurisdiction of this appeal

necessarily has held that counsel's misunderstanding of the Federal Rules was equivalent to excusable neglect, irrespective of the Court's disclaimer of that effect in its amended opinion (Appendix B, infra). If excusable neglect is to be synonymous with a misunderstanding of the Federal Rules, it takes little imagination to carry forward the implication and practical application of such a holding in the future on Federal Rules, both Civil and Appellate. A misunderstanding of Federal Rules would then become grounds for belated compulsory counterclaims under F.R.C.P. 13(f). The failure of counsel to understand almost any conceivable rule of law would be sufficient grounds, in a trial judge's discretion, to change the status of a judgment under F.R.C.P. 60(b). Finally, the duty to make discovery within defined perimeters would be meaningless under F.R.C.P. 6(b), allowing tardy responses wherever the trial judge found "excusable neglect".

It is respectfully submitted that the interpretation of the term "excusable neglect" has important implications in both the Federal Rules of Civil and Appellate Procedure, and that the circumstances which would justify a finding of excusable neglect should be the subject of an opinion by this Court.

IV.

The Decision Below Erroneously Interprets Rule 4(a), Federal Rules Of Appellate Procedure, As Allowing A District Court, 50 Days After The Date Of Appealable Judgment, To Enter An Order Extending The Time For Filing A Notice Of Appeal Without Any Written Motion Seeking Such Extension Being Filed By Appellant, Thereby Overlooking The Clear Requirements Of Rules 6(d) And 7(b), Federal Rules Of Civil Procedure.

The Plaintiff in this case appealed from an Order issued on June 4, 1975, denying plaintiff's motion for a new trial. Pursuant to Rule 4(a), Federal Rules of Appellate Procedure, the thirty-day time period for filing a Notice of Appeal began again to run on June 4, 1975, and ended no later than July 7, 1975. Plaintiff did not file any Notice of Appeal until July 24, 1975, 50 days after the entry of the Order from which this appeal was taken.

The only provision in the Federal Rules of Appellate Procedure providing for an extension of time to file a notice of appeal is the portion of Rule 4(a) which allows a maximum thirty-day extension for "excusable neglect". If a request for this extension is made after the initial 30 day time period for appeal has expired, it *must* be made by *written* motion with notice to the opposing parties followed by a hearing on the issue of excusable neglect. In the case at bar, the District Court issued an order finding excusable neglect without any prior written motion seeking such extension being filed. Rule 4(a) requires that an application for an extension of time to file a Notice of Appeal *"shall" be made by motion*, and with such notice as the Court shall deem appropriate. See 9 *Moore's Federal Practice*, ¶204.13[2], [3], at 974-978 (1975 ed.).

No Rule 4(a) motion appears of record, because no such motion was in fact ever made. In holding that they have jurisdiction over the appeal in this case, the Fifth Circuit has ignored the clear mandate of F.R.C.P. 7(b), that a motion *shall* be written and *shall* state with particularity the grounds therefor. *Files v. City of Rockford*, 440 F.2d 811, 816 (7th Cir. 1971) (Rule 4(a) motion *"must"* comply with F.R.C.P. 7(b)).

It is respectfully submitted that the requirements of the Federal Rules of Civil and Appellate Procedure are

intended to give all interested parties an opportunity to prepare for the motion and present their informed response. See *Diffenderfer v. Homer*, 408 F.2d 1344, 1346-47 (5th Cir. 1969); *North Umberland Mining Co. v. Standard Accident Insurance Co.*, 193 F.2d 951, 952 (9th Cir. 1952). The result in this case from the failure to file the required F.R.A.P. 4(a) written motion was that the defendant was denied the opportunity to review the plaintiff's written motion to extend the time for plaintiff to file his belated notice of appeal, and defendant was further denied the opportunity to prepare its response to said motion.

In upholding its jurisdiction in this case, the Fifth Circuit Court of Appeals has sanctioned a direct departure from the Federal Rules of Civil and Appellate Procedure by a lower court. This Honorable Court is authorized to exercise its power of supervision over the Fifth Circuit Court of Appeals in this case, in order to assure that the Federal Rules of Civil and Appellate Procedure are followed and applied consistently, correctly, and fairly, in all of the Circuit Courts of the United States.

CONCLUSION

Petitioner respectfully requests that a Writ of Certiorari be issued and that this Honorable Court review and reverse the judgment of the Court below. In the case at bar the Fifth Circuit Court of Appeals, by retaining jurisdiction, has necessarily established a significant and unprecedented expansion of the standard of "excusable neglect" which is clearly contrary to the decisions of all other Circuit Courts of Appeals of the United States which have considered this standard, as well as being contrary in principle to the standard of "unique circumstances" expressed by the United States Supreme Court. It is respectfully submitted that this departure from the unanimous opinion of six of the other Circuit Courts of Appeals and the principles stated by the United States Supreme Court are significant and important reasons for this Court to exercise its discretion and issue a Writ of Certiorari to review the holding of the Fifth Circuit Court of Appeals.

CERTIFICATE OF SERVICE

I. N. FORREST MONTET, Attorney for Petitioner GEORGE HANTSCHO CO., INC., and a member of the Bar of the Supreme Court of the United States, hereby certify that I have on this date served three printed copies of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit upon the Respondents and all parties to this case, by depositing same in a United States Mailbox with first class postage prepaid, addressed to the following counsel of record at their post office address, as required by Rule 33 of the Supreme Court of the United States.

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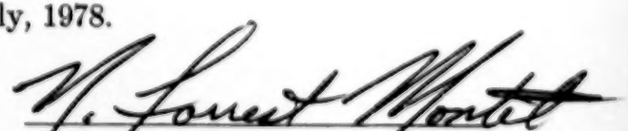
This 5th day of July, 1978.



N. FORREST MONTET,
Attorney for George Hantscho Co., Inc.

Appendices

APPENDIX A

Brian Atwood WANSOR, Plaintiff-Appellant,

v.

GEORGE HANTSCHO CO., INC.,
Defendant-Appellee,

v.

W. R. BEAN & SON, INC., Third-Party
Defendant-Appellee.

No. 75-3093.

United States Court of Appeals,
Fifth Circuit.

March 24, 1978.

Employee of owner of printing press injured while working on press brought suit against press manufacturer charging negligence and breach of implied warranties. The United States District Court for the Northern District of Georgia, William C. O'Kelley, Jr., granted manufacturer's motion for a directed verdict, and injured employee appealed. The Court of Appeals, Brown, Chief Judge, held that: (1) district court did not abuse its discretion in finding that delay in filing appeal caused by counsel's misunderstanding that motion to reconsider had tolled period for filing appeal constituted excusable neglect and (2) court would certify case to Georgia Supreme Court for resolution of issue whether Georgia doctrine of strict liability, based on language enacted in 1968 and interpreted decisively in 1975, applied as to press which was installed in 1961 and which allegedly resulted in injuries to owner's employee in 1971 and other pertinent state law questions.

Certified to Georgia Supreme Court.

1. Federal Courts—656

A motion to reconsider an order which disposes of a motion of the kind enumerated in rule providing that time period for appealing is tolled by certain motions including, inter alia, motion for judgment, for altered or amended judgment or for new trial does not again terminate running of time for appeal. Fed.Rules App.Proc. rule 4(a), 28 U.S.C.A.; Fed.Rules Civ.Proc. rules 50(b), 59, 28 U.S.C.A.

2. Federal Courts—655

District court did not abuse its discretion in finding that delay in filing appeal caused by plaintiff's counsel's misunderstanding that motion to reconsider had tolled period for filing appeal constituted excusable neglect justifying extension of time for filing appeal; thus, finding would not be disturbed. Fed.Rules App.Proc. rule 4(a), 28 U.S.C.A.

3. Federal Civil Procedure—2142, 2152

If facts and inferences point so strongly and overwhelming in favor of one party that court believes that reasonable men could not arrive at a contrary verdict, granting of motion for directed verdict is proper; however, if there is substantial evidence opposed to motion, that is, evidence of such quality and weight that reasonable and fairminded men in exercise of impartial judgment might reach different conclusion, motion should be denied and case submitted to jury.

4. Federal Civil Procedure—2146

A mere scintilla of evidence is insufficient to present question for jury and so preclude granting of directed verdict.

5. Federal Courts—798

On appeal from granting of directed verdict, Court of Appeals is to view all evidence with all reasonable inferences most favorable to nonmoving party.

6. Federal Courts—392

Propriety of granting of directed verdict for printing press manufacturer sued in products liability action would not be determined by Court of Appeals, where question turned on outcome of state law questions court submitted to State Supreme Court for resolution; thus, resolution of issue would be deferred until state returned case.

7. Federal Civil Procedure—882

Although strict liability was not explicitly raised by complaint or pretrial order, where suit was in part based on state statute which had been interpreted as imposing degree of strict liability upon manufacturer and case was tried without objection with respect to facts giving rise to strict liability, strict liability was issue in case. Code Ga. § 105-106; Fed.Rules Civ.Proc. rule 15(b), 28 U.S.C.A.

8. Federal Courts—392

To resolve issues raised in products liability action brought against printing press manufacturer by press owner's employee who was injured while working on press, which issues, including strict liability, were controlled by important questions of Georgia law, and to insure stare decisis effect for its opinion, Court of Appeals would certify case to Georgia Supreme Court for resolution of issue whether Georgia doctrine of strict liability, based on language enacted in 1968 and interpreted decisively in 1975, applied as to printing press which was installed in 1961 and allegedly resulted in injuries to

owner's employee in 1971 and other pertinent state law questions. Code Ga. § 24-3902.

9. Products Liability—8

A defect is required for a successful claim of strict liability.

Appeal from the United States District Court for the Northern District of Georgia.

Before BROWN, Chief Judge, COLEMAN and MORGAN, Circuit Judges.

JOHN R. BROWN, Chief Judge:

In this products liability action, Brian A. Wansor seeks damages for injuries he sustained while working on a printing press owned by his employer, W. R. Bean & Son, Inc. (Bean). Wansor sued the manufacturer of the press, the George Hantscho Company, Inc. (Hantscho), alleging negligence and breach of implied warranties. At the close of the plaintiff's case, the District Court granted Hantscho's motion for a directed verdict and this appeal followed. We hold that the appeal is timely but do not now reach either the propriety of the grant of the directed verdict or the merits of Wansor's claim. Because the issues are controlled by important questions of Georgia law, we certify the case to the Georgia Supreme Court to determine whether the state's rules governing strict liability allow the recovery sought.

The Turning Of The Screw

On the date Wansor was injured, August 10, 1971, he had been working for Bean, a magazine printing firm, for approximately three weeks. Wansor's job as a jogboy, or journeyman, the lowest position in this shop, required

him to see that webb paper coming out of the multi-unit printing press as finished product was stacked and bundled for shipment and delivery. Although Wansor did not actually operate the machinery, he had helped three or four times in cleaning the press after a printing run to remove the ink residue. Wansor was injured during this wash-up process.

After each run, the press was stopped, pans placed under the rollers, and the press turned on so that all six units were idling. Each crew member, armed with a bottle filled with naptha, a cleaning solvent, then stood on a catwalk running around each unit and into the machine and squirted naptha on the unguarded, revolving rollers. Some of the naptha, mixed with ink, would be thrown back onto the catwalks as the rollers turned. Most of the ink and solvent would drip onto the lowest rollers and into the pans. The lower roller was cleaned by a blade that scraped off the accumulating residue. This blade was adjusted before and during the process to ensure that all the residue was removed. Wansor's injuries occurred while he was making this adjustment, the first time he had performed this task.

To adjust the scraper blade, Wansor had to crouch on the catwalk to avoid being hit by the unguarded rollers above him, turn two screws located about fifty inches apart, then back out in the same Russian-folk-dance crouched walk. On the date involved here, Wansor had finished adjusting the screws and was beginning to back out of the machine when he slipped on the now oily catwalk. In the fall, Wansor's right hand became caught in the unguarded rollers. He attempted to pull his hand out but succeeded only in entangling his left hand as well and in the struggle caught his hair on the upper rollers. Al-

though the machine was quickly turned off, Wansor's hands were severely mangled. Despite extensive medical treatment, he lost most of the fingers and part of the thumb from his right hand and two fingers from his left hand.

Plaintiff Wansor contended that Hantscho was negligent in the manufacture, design, construction, installation, and assembly of the press.[1] Wansor specifically pointed to the lack of guards for the rollers; the placement of the adjustment screws for the scraper blade inside the machine frame next to the rotating equipment; the placement of the catwalk between the units of the machine, requiring a workman to assume a crouched position to reach the adjustment screws; the lack of a device to prevent the catwalk from becoming slick with ink and naptha thrown from the rollers; and the design that permitted the scraper blade to be adjusted while the machine was in operation. Asserting that these aspects of the machine's construction and operation rendered it inherently dangerous, plaintiff also claimed that Hantscho was negligent in failing to warn of such dangers. Finally, Wansor claimed that the machine was defective, in breach of the implied warranties of merchantability and intended use that are statutorily imposed on manufacturers under Georgia Code Ann. § 105-106.[2]

[1] Wansor had collected Workmen's Compensation payments from his employer and did not name Bean in the suit. Hantscho brought a third-party action against Bean, claiming that Bean was negligent in not stopping the machine when the scraper blade required adjustment during the cleaning process.

[2] The statute, amended in 1968 to add the second sentence, the language relevant here, provides:

105-106. (4408) **Privity to support action.**—No privity is necessary to support an action for a tort; but if the tort results from the violation of a duty, itself the consequence of a contract, the right of action is confined to the parties and privies to that contract, except in cases where the party would have had a right of action for the injury done, independently of the contract, and except as provided in Code section 109A-2—318. However, the manufacturer of any personal property sold as new property, either directly or through a dealer or any other person, shall be liable in tort, irrespective of privity, to any natural person who may use, consume or reasonably be affected by the property and who suffers injury to his person or property because the property when sold by the manufacturer was not merchantable and reasonably suited to the use intended and its condition when sold is the proximate cause of the injury sustained; a manufacturer may not exclude or limit the operation hereof.

At the close of the plaintiff's case, during which experts testified as to the applicable standards of safety in design, manufacture, and operation, the District Judge directed a verdict for the defendant Hantscho. The Judge based his verdict partially on the so-called state of the art defense, stating that "[a] critical test [for negligence] . . . is what the manufacturer knew at the time the equipment was manufactured and what was common practice within the industry at the time," and partially on a finding that the dangers of the machine were open and obvious, thus relieving the manufacturer of a duty to protect or warn the plaintiff.

On this appeal, Wansor urges us to hold that by granting the directed verdict, the District Judge erroneously took the case from the jury when questions remained that belonged to the jury as a matter of law. In particular, Wansor points to the fact that the Judge directed the verdict on March 20, 1975, the day on which the Georgia Court of Appeals handed down the decision clarifying the applicability of strict liability in the state.[3] Wansor asserts that the District Judge erred in refusing to submit questions arising under this doctrine to the jury.

[3] *Parzini v. Center Chemical Co.*, 1975, 134 Ga.App. 414, 214 S.E.2d 700.

Have We An Appeal?

Before we can begin to discuss the merits of Wansor's contentions, we must address Hantscho's claim that the appeal is untimely and must therefore be dismissed. Hantscho bases this argument on F.R.A.P. 4(a),[4] which requires that a timely notice of appeal must be filed "within 30 days of the date of the entry of the . . . order appealed from . . . ." This 30-day period is tolled by a timely motion for judgment under F.R.Civ.P. 50(b); for an altered or amended judgment under F.R.Civ.P. 59; or for a new trial under F.R.Civ.P. 59. The time for appeal begins to run again when the judge grants or denies one

[4] F.R.A.P. 4(a) provides, in relevant part:

(a) Appeals in Civil Cases. In a civil case . . . in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days of the date of the entry of the judgment or order appealed from. . . .

The running of the time for filing a notice of appeal is terminated as to all parties by a timely motion filed in the district court by any party pursuant to the Federal Rules of Civil Procedure hereafter enumerated in this sentence, and the full time for appeal fixed by this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: (1) granting or denying a motion for judgment under Rule 50(b); (2) granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) granting or denying a motion under Rule 59 to alter or amend the judgment; (4) denying a motion for a new trial under Rule 59. A judgment or order is entered within the meaning of this subdivision when it is entered in the civil docket.

Upon a showing of excusable neglect, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision. Such an extension may be granted before or after the time otherwise prescribed by this subdivision has expired; but if a request for an extension is made after such time has expired, it shall be made by motion with such notice as the court shall deem appropriate.

of these motions. If an appeal is not filed within 30 days after such an order is entered, the judge may extend the time upon a showing that the failure to file a timely appeal was the result of excusable neglect.

The District Court directed a verdict for Hantscho on March 20, 1975. The running of the 30-day period for appeal was tolled on March 28, when Wansor filed motions for a new trial, for judgment notwithstanding the verdict, and to set aside the judgment. On June 4, 1975, the District Court denied these motions, and the 30-day period began to run anew, ending no later than July 7, 1975. On this date, Wansor had not filed an appeal. However, on June 13, he filed a motion asking the District Court Judge to reconsider the June 4 order denying plaintiff's previous motions. The Judge denied this motion on July 22, and Wansor filed a notice of appeal on July 24, after obtaining an order extending the time for appeal.

[1] The District Court Judge found that Wansor's delay resulted from a belief that the motion to reconsider filed on June 13 was among the motions that toll the period for filing an appeal. This belief is mistaken. A motion to reconsider an order disposing of a motion of the kind enumerated in Rule 4(a) does not again terminate the running of the time for appeal.[5] *Ellis v. Richardson*, 5 Cir., 1973, 471 F.2d 720; 9 Moore's Federal Practice ¶ 73.09[4], at 3186. The District Court Judge found that the cause of the delay, counsel's misunderstanding of the effect of the June 13 motion, constituted excusable ne-

[5] If this were a motion to reconsider the original judgment, it would function as a motion for new trial or judgment notwithstanding the verdict, and would toll the running of the period for appeal if timely filed—within 10 days after the judgment. Because this motion was filed almost 3 months after the original judgment, it obviously would not be timely.

glect. Hantscho challenges this finding, claiming that the District Court misapplied the standard for excusable neglect that will justify an untimely appeal under Rule 4(a).[6] A panel of this Court has already denied a motion by Hantscho to dismiss the appeal. On the full record, we affirm this earlier order.

[2] A brief look at the history of Rule 4(a) and the excusable neglect rule leads us to conclude that the District Court's finding and the prior ruling of this Court cannot be reversed. Until 1946, the civil rules permitted no extension of the time for appeal. Prior to 1966, a party could obtain an extension of the time for filing a notice of appeal in a civil case only by showing that he had failed to learn of the entry of the judgment, F.R.Civ.P. 73(a).[7] The 1966 amendment omitted this restriction, providing instead that the District Court had the power to extend the time for appeal "upon a showing of excusable neglect." The Advisory Committee Notes to the 1966 amendment to former Rule 73(a) do not indicate what grounds besides failure to learn of the entry of judgment will constitute excusable neglect. The Notes did emphasize that the District Court has discretion to grant

[6] Hantscho also claimed that the Judge ignored Rule 4(a)'s requirement that a request for an extension made after the time for appeal has expired must be made by written motion, with prior notice to the nonmoving party and a hearing on the issue of excusable neglect. Wansor contests this description of the procedures followed in securing the order extending the time for appeal, claiming that the order was made by motion and did not issue ex parte. Wansor also emphasizes that the notice to the nonmoving party required by the rule is "such notice as the court shall deem appropriate." Given the conflicting facts before us and the open terms of the rule, we see no basis for dismissing the appeal on the grounds of insufficient notice or improper procedures followed in the issuance of the order.

[7] E. g., *Watson v. Providence Washington Insurance Co.*, 4 Cir., 1953, 201 F.2d 736. Until the 1966 amendments, no extensions were permitted in criminal cases for any reason. E. g., *United States v. Robinson*, 1960, 361 U.S. 220, 80 S.Ct. 282, 4 L.Ed.2d 259.

extensions of time, a discretion based in the need for action in cases "where injustice would otherwise result." In the present case, the District Court exercised this discretion and found that counsel's error was excusable neglect. We are unable to say that this finding is a clear abuse of the discretion granted by the rule, and therefore decline to dismiss the appeal.

add new paragraph from p. 16 here.

Directed Verdict

[3-5] The propriety of a District Court's grant of a directed verdict is measured by the standard set by this Court in *Boeing Company v. Shipman*, 5 Cir., 1969, 411 F.2d 365, 374 (en banc):

> If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury.

On appeal, the Court is to view all the evidence with all reasonable inferences most favorable to the nonmoving party. *Worthington Corp. v. Consolidated Aluminum Corp.*, 5 Cir., 1976, 544 F.2d 227, 230; *Callon Petroleum Co. v. Big Chief Drilling Co.*, 5 Cir., 1977, 548 F.2d 1174, 1176.

Wansor had been working at Bean for approximately three weeks when he was injured. While he had previously participated in the general clean-up operation, he had never before adjusted the screws during the process. Wan-

sor presented evidence showing that during the cleaning procedure, naptha would splash on the catwalk and leave it slippery, and that one had to adjust the screw while crouching on this slippery catwalk and exit by backing out in the same crouched position. There was testimony that Hantscho knew that Bean ordinarily kept the machine running during the clean-up operation as a means of minimizing the "down time" involved.

[6] In most cases, we would find it a relatively straightforward matter to apply the law governing directed verdicts to such facts as these. This case, however, is complicated by its diversity origins. Whether a directed verdict was properly granted—a question of federal law—turns on the outcome of the state law questions that are to be submitted to the Supreme Court of Georgia for resolution. The critical qustion to be submitted, and the basis for our certification of this case, is whether the Georgia doctrine of strict liability, based as it is on language enacted in 1968 and interpreted decisively in 1975, applies retroactively. If the Georgia Court holds that the statutory basis for strict liability does not apply to machinery installed in 1961, plaintiff's assertion that the directed verdict improperly took questions arising under the doctrine from the jury would fail. If, on the other hand, Georgia rules that § 105-106 allows recovery for injuries occurring in 1971, then the ingredients of a strict liability claim would be appropriate for jury resolution.

Until the retroactivity question is answered, any efforts on our part to measure the propriety of the directed verdict would be premature. We therefore defer the resolution of this issue until Georgia returns the case to us pursuant to the procedure of certification.

Strict Liability In Georgia

[7] Hantscho first contends that strict liability is not at issue in this case because it was not pleaded in the court below. We cannot agree with this proposition. While it is true that neither the complaint nor the pretrial order used the magic words "strict liability," the suit was in part based on Georgia Code Ann. § 105-106, set forth at note 2, *supra*. It is understandable that counsel in drafting the complaint did not explicitly refer to strict liability: § 105-106 had not yet been interpreted by the Georgia Court of Appeals at the time the case was filed. However, prior to the trial the Georgia Supreme Court did say that § 105-106 imposes a degree of strict liability upon manufacturers. *Ellis v. Rich's Inc.*, 1975, 233 Ga. 573, 212 S.E.2d 373.[8] The Federal Rules of Civil Procedure demand a liberal construction of pleadings, requiring only that they give fair notice of what the evidence is expected to show. Hantscho does not claim surprise or inability to prepare a defense to the issue of strict liability. The only contention is that strict liability was not explicitly raised by the complaint or pretrial order. This attack is answered by F.R.Civ.P. 15(b), which provides:

[8] Indeed, as indicated above, the *Parzini* case was before the Georgia courts at the time this case was tried below. In *Parzini*, a claim for injuries sustained when highly caustic drain solvent squirted onto the plaintiff from a bottle manufactured by the defendant, the Superior Court had entered judgment on a verdict for the manufacturer. On March 20, 1975, the Court of Appeals reversed, upholding the statement in *Ellis v. Rich's, Inc.*, 233 Ga. 573, 212 S.E.2d 373, that § 105-106 " 'does impose a degree of strict liability upon manufacturers,' " *Parzini v. Center Chemical Co.*, 134 Ga. App. 414, 214 S.E.2d 700, at 702, and clarifying the bases of liability. Wansor made the trial judge aware that a decision was imminent from the Georgia Court of Appeals, whose holdings are binding throughout the state and on us as we sit for Georgia in a diversity case. The trial judge nonetheless directed a verdict for Hantscho on the same day that the *Parzini* opinion was handed down by the Georgia court.

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.

The record reveals that with respect to the facts that might give rise to strict liability, the case was tried without objection. Rule 15(b) does not lose its vitality because, in addition to the facts introduced without objection, the pleader failed to include a tag identifying the reasons giving such facts their legal significance. As evidence of the presence of the contention below, we point out the trial judge's statements that the holding in *Ellis* was dicta and that he did not believe that the Georgia courts would interpret the Georgia statute to apply retroactively. It is to this question that we now turn.

Hantscho manufactured this printing press in 1960 and installed it at Bean in 1961. The statutory basis for the strict liability claim, Georgia Code Ann. § 105-106, was not amended until 1968 to overcome privity limitations on tort recoveries, and was not decisively interpreted to incorporate strict liability until 1975. Does the Georgia doctrine of strict liability apply retroactively to products manufactured prior to 1975? Prior to 1968? As early as the date of installation, 1961? The date of manufacture, 1960?

[8] To resolve the issues for all the parties and to insure stare decisis effect for our opinion, we certify this case to the Georgia Supreme Court for a resolution of this and other state law questions.[9]

[9] Certification to the Georgia Supreme Court is possible under Ga. Code Ann. § 24-3902, as amended in 1977. For our first use of this important state statutory aid to federal courts, see *In re McClintock*, 5 Cir., 1977, 558 F.2d 732, on certification ____ S.E.2d ____, Ga., 1978.

[9] Because we are certifying the case, we do not here decide Hantscho's contention that no recovery can be had because Wansor showed no defect. We agree with the general proposition that a defect is required for a successful claim of strict liability, but do not decide here whether the machine, which unquestionably functioned flawlessly as a printing press, was nonetheless rendered defective by Hantscho's failure to protect or warn against the dangers posed by the unguarded rollers. This question will become decisive only if the doctrine of strict liability applies to the case, the question we have directed to the Georgia Supreme Court. For the same reason, we decline to reach Hantscho's alternative contention that, assuming the machine to be defective, because the danger of becoming caught in the rollers was open and obvious, and because Wansor's testimony indicated he knew of the hazards involved, no liability can be predicated on § 105-106. Our review of Georgia law indicates that an obvious danger, known to the plaintiff, precludes recovery under strict liability only if "his use of the product in view of this knowledge was unreasonable," *Parzini v. Center Chemical Co.*, 1975, 136 Ga.App. 396, 221 S.E.2d 475.[10] This ques-

See Brown, *Certification—Federalism in Action*, 7 Cumberland L.R. 455 (1977), for a description of the development of this important device of federalism.

[10] Wansor urges that the Georgia courts would follow others jurisdictions that have allowed recovery under strict liability for injuries that are open, obvious, and known to the plaintiff, without an inquiry into whether his use of the product was reasonable e. g., *Micallef v. Miehle Co.*, 1976, 39 N.Y.2d 376, 384 N.Y.S.2d 115, 348 N.E.2d 571, overruling New York's "patent danger rule" of *Campo v. Scofield*, 1950, 301 N.Y. 468, 95 N.E.2d 802; *Pike v. Frank G. Hough Co.*, 1970, 2 Cal.3d 465, 85 Cal.Rptr. 629, 467 P.2d 229. We do not see sufficient uncertainty in Georgia law on this point to warrant its inclusion as a question to be submitted in the certification. However, we do not intend to restrict the Georgia Court's response, and would welcome correction of our understanding of this point.

tion must also await the completion of the certification process.

As is our practice, by directive from the Clerk, we now ask counsel to assist us in drafting the facts and issues to be certified.[11] Of course, we do not intend the statement of the issues to inhibit Georgia in framing its answer and we welcome answers as well to corollary questions thought to be significant.[12]

On receipt of counsels' proposed statement of the facts and issues to be certified, we will issue the formal certification transmitting the entire record in this case, the Court's opinion, and all the papers and briefs to the Georgia Supreme Court.

Certified to the Supreme Court of Georgia.

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[11] We invariably require this assistance from counsel in certified cases. See, e. g., *Allen v. Estate of Carman*, 5 Cir., 1971, 446 F.2d 1276; *Boyd v. Bowman*, 5 Cir., 1971, 443 F.2d 848.

[12] As we have often stated before, e. g., *Martinez v. Rodriquez*, 5 Cir., 1968, 394 F.2d 156, 159 n. 6:

> [w]e emphasize . . . that the particular phrasing used in the certified question is not to restrict the Supreme Court's consideration of the problems involved and the issues as the Supreme Court perceives them to be in its analysis of the record certified in this case. This latitude extends to the Supreme Court's restatement of the issue or issues and the manner in which the answers are to be given, whether as a comprehensive whole or in subordinate or even contingent parts.

APPENDIX B

Brian Atwood WANSOR, Plaintiff-Appellant,

v.

GEORGE HANTSCHO, CO., INC., Defendant-Third-Party Plaintiff-Appellee,

v.

W. R. BEAN & SON, INC., Third-Party Defendant-Appellee.

No. 75-3093.

United States Court of Appeals, Fifth Circuit.

May 24, 1978.

Appeal from the United States District Court for the Northern District of Georgia; William C. O'Kelley, Judge.

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

Before BROWN, Chief Judge, COLEMAN and MORGAN, Circuit Judges.

PER CURIAM:

The opinion of the panel, appearing at 570 F.2d 1202, is amended by the addition of the following language to appear as a new paragraph at 570 F.2d 1207, immediately prior to the section entitled "Directed Verdict":

> We do not hold that a bona fide misunderstanding or mistake as to the law by counsel will constitute excusable neglect. We recognize that such a proposition would make the requirement of timely filing almost undeterminable. See *Airline Pilots in the Service of Executive Airlines, Inc. v. Executive Airlines,*

Inc., 1 Cir., 1978, 569 F.2d 1174, 1175; 9 Moore's Federal Practice, ¶204.13[1], at 967-74, for explanations of the excusable neglect requirement and examples of the most frequently accepted excuses. All we decide here is that, viewing the facts and circumstances as a whole, the District Court Judge did not abuse his discretion in granting an extended time for appeal.

In its Petition for Rehearing and Rehearing En Banc, Hantscho draws our attention to several instances in the opinion in which our account of the facts is claimed to be misstated. Most of these are inconsequential evidentiary details which will be corrected if, as the Court has requested, both parties collaborate in a professionally responsible manner to furnish a formal statement of facts to the Supreme Court of Georgia, that will afford an adequate, accurate statement of the operational facts. However, in the interest of accuracy at all stages of this litigation, the following amendments are made to the panel's opinion:

The final sentence of the first paragraph at 1204 is amended to read: "Wansor's injuries occurred while he was making this adjustment, the first time he had performed this task while the machine was in operation."

The first sentence in the paragraph immediately folfowing is amended to delete the word "unguarded."

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.